



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 3, 1998

Ms. Laura C. Higley  
Baker & Botts, L.L.P.  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002-4995

OR98-0580

Dear Ms. Higley:

You ask this office to reconsider our ruling in Open Records Letter No. 97-2781 (1997). Your request for reconsideration was assigned ID# 113562.

The Houston Municipal Employees Pension System (the "system") received an open records request for the winning proposal submitted to the system for a retirement pension administration computer application. The requestor also seeks "all associated notes, documents and agreements pertaining to the proposal." In Open Records Letter No. 97-2781 (1997), this office concluded that the system could withhold the proposal under section 552.110 of the Government Code. We further concluded that neither the system nor Vitech Benefit Systems ("Vitech") had established the applicability of section 552.110 to the remaining requested information. In your request for reconsideration, you and Vitech argue that the Software Licensing Agreement (the "agreement") between the system and Vitech is excepted from disclosure under section 552.110.

Vitech has provided us with a clarification of its original arguments in an attempt to demonstrate the applicability of section 552.110 to the agreement. We have reviewed Vitech's arguments for withholding the agreement and conclude that some of the agreement may be withheld under section 552.110 of the Government Code. Specifically, Exhibits A through E may be withheld. Open Records Letter No. 97-2781 (1997) is overruled to the extent it conflicts with this conclusion.

We do not believe, however, that the general terms of the agreement fall within the Restatement definition of a trade secret. The agreement terms are not "a process or device for continuous use in the operation of the business;" they are information contained in a contract, that is, a "single or ephemeral [event] in the conduct of the business." RESTATEMENT OF TORTS § 757 cmt. b (1930) (defining trade secret as not encompassing information that relates to single event in the conduct of business), Open Records Decision No. 592 (1991); *see* Open Records Decision Nos. 319 (1982) at 3 (section 552.110 not applicable to pricing information in government contract), 306 (1982) at 3 (same).

Furthermore, we do not believe that the general terms of the agreement may be withheld as commercial or financial information under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). The public has an interest in knowing the terms that the system negotiates with third parties for agreements of this nature. We conclude that the basic terms of the agreement, specifically pages 1 through 13, are not excepted from disclosure under section 552.110 as commercial or financial information.

Finally, we note that Vitech reasserts that the agreement is confidential because the system has agreed to maintain it as confidential. As we stated in Open Records Letter No. 97-2781 (1997), information is not confidential under the Open Records Act simply because the party submitting the information to a governmental entity requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). Notwithstanding any contract between the system and Vitech specifying otherwise, the system cannot overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987).<sup>1</sup>

If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Deputy Chief  
Open Records Division

LRD/rho

Ref.: ID# 113562

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<sup>1</sup>We note that paragraph 4.2 of the agreement states that the system "shall neither discuss nor otherwise disclose to any third party any terms of this Agreement, except to the extent, if any, that the [system] may be required to make any such disclosure by any subpoena, court order, decree, law, or regulation applicable to the [system]." (Emphasis added.) As much of the agreement does not fall within one of the act's exceptions to disclosure, the Open Records Act requires that the system disclose the information.

Enclosures: Submitted documents

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